Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL RUDY THAM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE KAUFMANN
(Counsel of Record)
WOODY N. PETERSON
MARK A. PACKMAN
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for Petitioner

Of Counsel:
JOHN E. MILONAS
459 Fulton Street
San Francisco, CA 94102

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. When a defendant charged with embezzling union funds in violation of 29 U.S.C. § 501(c) produces evidence that he expended those funds pursuant to union bylaws, is he entitled, upon request, to have the Court instruct the jury concerning the meaning, applicability and legality of those bylaws?

2. Where a Court of Appeals has determined that a prosecutor has engaged in misconduct in the course of a federal criminal trial, may the Court affirm a conviction on the basis of a standard more harsh to the defendant than that established by this Court for identifying "harmless error" in *Kotteakos v. United States*, 328 U.S. 750?

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OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It is reproduced as Appendix A, pp. 1a to 14a *infra*. The unreported amendment to the opinion of the Court of Appeals, filed together with a denial of rehearing, is reproduced as Appendix B, pp. 15a to 16a, *infra*. The District Court wrote no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on October 5, 1981. A timely petition for rehearing and rehearing *en banc* was denied on December 16, 1981 (Appendix C, p. 17a *infra*). This Court has jurisdiction under 28 U.S.C. § 1254(1).

The District Court had jurisdiction of this criminal prosecution under 18 U.S.C. § 3231.

STATUTORY PROVISIONS AND RULES INVOLVED

This case involves § 501 of the Labor-Management Reporting and Disclosure Act of 1959 (hereafter "LMRDA") 73 Stat. 519, 535, 29 U.S.C. § 501; the "harmless error" provision of the Judicial Code (28 U.S.C. § 2111); and Rules 30 and 52(a) of the Federal Rules of Criminal Procedure. Each of the foregoing provisions is reproduced in pertinent part in Appendix D, pp. 18a to 20a, *infra*.

STATEMENT OF THE CASE

A. The Proceedings in the Trial Court

1. *The Centrality of the Union Bylaws to Petitioner's Defense*

The first question presented by the petition arises from the trial court's refusal to instruct the jury on the legal basis of petitioner's defense. We therefore begin by describing as concisely as possible the respective theories of the parties.

For over thirty years, petitioner has been the Secretary-Treasurer (Chief Executive Officer) of Local 856, an approximately 7,000-member Local of the International Brotherhood of Teamsters ("IBT") (R.T. 1876).[1] He was charged with 16 counts of embezzlement in violation of 29 U.S.C. § 501(c) and 4 misdemeanor counts for false entry in union records in violation of 29 U.S.C. § 439(c).

The thrust of the government's case was the contention that appellant had used union funds to pay for meals and hotel rooms for persons unrelated to union business.[2]

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[1] "R.T." refers to the Reporter's Transcript in the District Court which was also the record on appeal.

[2] The amounts found to be misappropriated were as follows: 1975; $92.55; 1976: $293.94; 1977: $1,433.05; 1978: $185.50.

There was no allegation that petitioner personally received any funds.[a] Rather, the primary thrust of the government's case focused on expenditures on behalf of one Aladena Fratianno, a now self-confessed gangland murderer who has become a government witness in federal trials throughout the nation pursuant to a plea bargain (R.T. 390-400; see also pp. 11a, 12a, *infra*). Petitioner was convicted of spending $1,335.98 on Mr. Fratianno during the four-year period. Petitioner's defense was that he did so because of Mr. Fratianno's extensive efforts to arrange beneficial eye care and dental plan clinics for union members.

The critical factual issue for the jury to determine was whether petitioner had a good-faith belief that his expenditures were for the benefit of the union. Petitioner constantly emphasized that his expenditures were authorized by the union constitution and bylaws. The prosecution introduced into evidence two volumes of the Constitution of the International Brotherhood of Teamsters, and one volume of the Local 856 Bylaws (Exs. 21-A through 21-C, R.T. 389).

The defense offered as a witness Albert Brundage, Esq., whom the judge said was "known to me as a leading, competent, and highly reputable labor lawyer" (R.T. 2562). Brundage had participated in the drafting of the bylaws. In his testimony Brundage detailed the underpinnings of the bylaws, pinpointed the applicable provisions governing expenditures and related specific conversations with petitioner, thus bearing on petitioner's intent.

Brundage had specifically discussed the applicable provisions of the bylaws with petitioner and advised peti-

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[a] Petitioner ultimately was acquitted on the largest single count—$652.00—an allegation that he had caused the purchase of an airline ticket for his wife, Evelyn Tham, to New York City. The trial evidence revealed that Mrs. Tham was the office manager for Local 856 for nineteen years and had traveled to New York for union purposes (R.T. 1630).

tioner "that monies could be expended under the bylaws for activities which directly or indirectly affected the welfare of the union" and that "a determination was to be made by the chief executive officer, whether the expenditure—in his view—directly or indirectly, affected or benefited the welfare of the organization" (R.T. 2571). He also advised petitioner that "these bylaws are drafted so that the interpretation and the determination is to be made by the chief executive officer without the necessity of having approval of either the executive board or the membership" (R.T. 2572). When defendant testified in his own behalf, he explained that he relied upon the local union bylaws for guiding the expenditure of union funds (R.T. 1878-79, 1893).[4]

2. *The Instructions Concerning the Bylaws Which the Trial Court Refused and Those It Gave*

When defense counsel sought specifically to obtain testimony from Mr. Brundage regarding "the interpretation as to which provisions of the bylaws are applicable with respect to the expenditure of union funds" (R.T. 2563), the court sustained an objection. The court ruled:

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[4] Tham testified:

> Q. Now, is there a particular document that you rely on to express your powers? A. Well, we have a local union bylaws, which is not in conflict with the international constitution, and I abide by those bylaws, that is our bible.
>
> Q. When you say it is your bible, have you had occasion to review that bible? A. Very much so.
>
> Q. The union constitution? A. Yes.
>
> Q. The bylaws enacted by the local? A. Yes.
>
> Q. Have you had discussions with attorneys over the years about the interpretation of that? A. Since the enactment of our first bylaws back in 1961, after the 1959 Landrum-Griffin Bill went into effect, Jimmy Hoffa along with attorneys from our Washington, D.C., office had seminars in every joint council in the country, explaining the model union bylaws that were enacted at the 1961 convention, and which were approved by Federal Court Judge Letts. (R.T. 1878-79)

> I really believe, counsel, that the question that is now involved is to be covered by the court's instructions as to the meaning and effect of the law. I don't think it is a matter that is properly before the jury. [R.T. 2563-2564.]

Moments later, when the witness discussed specific bylaws provisions, the prosecutor also voiced the view that it was "the exclusive province of the court to instruct the jury on which, if any provisions of the bylaws are applicable to this case" (R.T. 2565).[5] However, when the time came actually to instruct the jury, the court, in agreement with the prosecutor, took the opposite view.

The defendant requested that the court instruct the jury as to which provisions of the bylaws were applicable (R.T. 2874-2889). See also the prior discussion of proposed instructions, R.T. 1255-1257. The court, however, refused to instruct on *any* part of the bylaws:

> MR. ROSENFIELD [Counsel for defendant]: May I suggest to the Court specifically I think the Court is under a legal duty to instruct the jury as to which are the applicable and not leave to counsel to argue which ones should be.
>
> THE COURT: I do not agree with that contention. I am refusing the instruction. [R.T. 2888-2889]

The instruction concerning 29 U.S.C. § 501(c) which the court did give was, in pertinent part, as follows:

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[5] The prosecutor said:

> I will object at this point, Your Honor. What is coming is an opinion from this witness about what the applicable provisions of the bylaws are which permit expenditures of union funds. I submit that the bylaws are in evidence. *It is the exclusive province of the court to instruct the jury on which, if any, provisions of the bylaws are applicable to this case.* (R.T. 2565, emphasis added).

> [T]he government must prove beyond a reasonable doubt that the defendant did not have a good-faith belief that the union funds were spent for the benefit of the union. Unless you are convinced beyond a reasonable doubt that the defendant lacked a good-faith belief that the expenditure of the funds was for the benefit of the union, then an embezzlement, theft, abstraction or conversion would not have occurred within the meaning of the law.
>
> * * *
>
> In evaluating the defendant's intent, you may consider whether or not he acted in good faith under the applicable provisions of the international constitution and bylaws of Local 856, which are in evidence before you.
>
> * * *
>
> Now, the bylaws may establish broad purposes for all kinds of different things that may be done for the benefit of the union. . . . But no matter how broad the bylaws may be in that regard, that does not mean that an officer can spend money for any old thing, . . . or for personal purposes of his own. [R.T. 3150-3152, 3224 as quoted by the Court of Appeals, pp. 3a-4a, *infra*]

Thus, the judge recognized the materiality of the bylaws, but left the jury to read them without any guideance as to their applicability, meaning, or legality.

In the course of its deliberations, the jury returned to the courtroom and requested that Mr. Brundage's testimony concerning the bylaws be reread. The Court, however, advised the jury, "if you do hear the testimony, and it relates to Mr. Brundage's exposition of what he considered to be the law, then I must tell you that to the extent that the instructions of the Court may have differed from his expressions of his view of the law, that you are to follow the instructions of the Court" (R.T. 3179).

Defendant vehemently opposed that instruction, urging that Mr. Brundage's testimony was fully consistent with the court's instructions of law (R.T. 3178-3179, 3181-3182). The result of the instruction was that the jury immediately withdrew its request for the testimony.

3. *The Verdict and Sentence*

The jury returned a verdict of guilty on the fifteen 29 U.S.C. § 501(c) counts relating to the expenditures which were charged to be for the benefit of Fratianno, and the four counts under 29 U.S.C. § 439(c) alleging false entries. With respect to each of the § 501(c) counts the court imposed a sentence of six months imprisonment plus four years probation, these sentences to run concurrently; the court also fined petitioner $10,000 on each of the first five § 501(c) counts. The court also imposed a four-year probation term on each of the § 439(c) counts, concurrent with the probation term on the § 501(c) counts.

B. The Proceedings in the Court of Appeals

The United States Court of Appeals for the Ninth Circuit affirmed. It approved as "a correct statement of the law" the instructions concerning 29 U.S.C. § 501(c) quoted at p. 6, *supra*. And it stated that it was "not an abuse of discretion for the district judge to refuse to read the specific bylaws to the jury, or to instruct the jury about those specific bylaws." (p. 4a, *infra*). The court also approved the trial court's treatment of the jury's request for supplemental instructions regarding Mr. Brundage's testimony about the bylaws (pp. 4a-5a, *infra*).

The Court of Appeals also rejected the defendant's other arguments for reversal. Its disposition of one of these must be described here, for it gives rise to the other question presented by this petition.

Defendant urged, and the Court of Appeals agreed that the prosecuting attorney had engaged in misconduct when, in front of the jury, he made what the Court described as "a suggestion that Tham's acquittal [in a prior case brought by the same prosecutor] was caused by the improper conduct by the Nevada district judge who tried that case" (Judge Claiborne). As the Court of Appeals said:

> * * * Although the prosecutor knew that there had been contact between Tham and the Nevada district judge, he had no basis on which to ask whether Tham had ever done a favor for the Nevada district judge. It was clear from the context of the question that the prosecutor was suggesting that the Nevada district judge had acted improperly in dismissing the case against Tham. Thus, the prosecutor was guilty of misconduct in asking this question. * * * [p. 10a, *infra*] [6]

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[6] The offending colloquy was as follows:

[Mr. Tham]: * * *

Didn't you take me to Las Vegas and I got acquitted up there in Las Vegas because of a violation of the labor act? Didn't I get acquitted up there? Didn't the judge say it was a sick trial, didn't he throw it out?

Q. [Mr. Emerson]: That was not an embezzlement. A. Well, it was a violation of the Taft-Hartley, wasn't it?

Q. That case involved your receipt of free rooms in Las Vegas in the Hilton, didn't it? A. But wasn't I acquitted?

Q. You tell me. A. That is what I understand.

Q. You were there? A. Yes.

Q. Did the jury ever get that case, Mr. Tham? A. No, the judge threw it out before they even got it.

Q. Judge Harry Claiborne? A. Right.

Q. You knew Judge Claiborne before that trial commenced? A. No.

Noting that allegations of prosecutorial misconduct including those herein are not ordinarily of constitutional dimension, the Court had declared:

> Therefore, even if we find prosecutorial misconduct, we will reverse only if we determine that it is more probable than not that the misconduct materially affected the verdict. *United States v. Valle-Valdez*, 554 F.2d 911, 915-16 (9th Cir. 1977). [p. 8a, *infra*]

Q. Didn't you do a favor for Judge Claiborne? A. No, I did not do a favor for Judge Claiborne.

MR. ROSENFIELD: Is that a federal judge, counsel? Do you suggest there is some impropriety? I ask that be stricken, Your Honor, it is outrageous to say it before a jury. Let him prove it. Let's try that, let's try federal judge Claiborne, a federal district judge in Las Vegas.

MR. EMERSON: Q. Prior to Judge Claiborne being appointed United States District Judge, didn't you do a favor for him when he was an attorney in Las Vegas? A. No, I did not.

Q. With the help of Mr. Fratianno? A. No.

Q. You did not get Judge Claiborne's son a job? A. I spoke to Judge Claiborne.

Q. Did you get his son in the truck driving school in Oakland? A. No, I did not.

Q. Did you have any communications with him when he was an attorney at all? A. I talked to Attorney Claiborne.

Q. Yes, about what? What did you talk to him about? A. He was seeking to get his son a job, and I was not able to do it.

Q. And that occurred in '75 or '76, thereabouts? A. I really don't know.

Q. Now, Mr. Tham—

MR. ROSENFIELD: I am going to ask that counsel be directed to follow this up with an offer of proof, your honor. What is suggested here, this is the most unbelievable thing I have ever witnessed in a court of law.

MR. EMERSON: This is cross-examination, your honor. The witness volunteered information about the Las Vegas case. I think I am entitled to go into that. (R.T. 2135-2137.)

Applying that standard the Court concluded that the prosecutor's misconduct did not warrant reversal (pp. 10a-11a, *infra*). The Court expressed doubt

> * * * that a reasonable juror would have believed that Tham had acted improperly by the fact that he had received a phone call from an attorney who subsequently became a district judge. If any impropriety could be remotely inferred, it would be on the part of the Nevada district judge, not Tham. [pp. 10a-11a, *infra*]

Petitioner filed a petition for rehearing or rehearing *en banc* in which he asserted, *inter alia*, that the "harmless error" standard set forth above was contrary to other decisions in the Ninth Circuit (including the *Valle-Valdez* case cited by the Court) and in other courts. The Court denied rehearing but issued an order amending its opinion. The sentence beginning "Therefore" which we quoted at p. 9, *supra*, was changed to read as follows:

> Therefore, if we find prosecutorial misconduct, we will reverse unless it is more probable than not that the misconduct did not materially affect the verdict. [Same cite.] [p. 15a, *infra*]

The Court also substituted the following for its previous conclusion:

> We conclude, however, that it is more probable than not that the misconduct did not affect the verdict. [pp. 15a-16a, *infra*].[7]

On the basis of that revised standard, and without further discussion, the Court adhered to its original decision to affirm despite the prosecutor's misconduct.

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[7] The Court also eliminated the last sentence in that section of its original opinion which had reiterated the conclusion under the original standard (p. 16a, *infra*).

REASONS FOR GRANTING THE WRIT

I. The Refusal to Instruct the Jury Concerning the Legality and Applicability of the Union Bylaws On Which the Defense Was Based Denied the Defendant a Fair Trial Under Long-Established Principles; That Ruling Also Jeopardizes All Union Officials Who Expend Funds Pursuant to Such Bylaws.

The failure of the trial court to instruct the jury, as requested by the defendant, concerning the legal effect and applicability of the union constitution and bylaws on which the defendant relied was fundamental error. It deprived the defendant of his right to be tried by a jury instructed on the law concerning the heart of his defense on the issues of intent and union benefit. That a trial court has failed to perform this essential historically recognized duty, and that a Court of Appeals has approved, is reason enough for this Court to grant review. But the error below has added importance because of its statutory context: The union's constitution, bylaws and resolutions (hereafter jointly referred to as "bylaws") are critical in any prosecution under 29 U.S.C. § 501(c) where the defendant is charged with the embezzlement or other misuse of union funds, and his defense is that the expenditure was proper, or was believed by him to be proper, by virtue of the provisions of those union bylaws. The decision below leaves it to the jury in each case to determine for itself, without any guidelines from the court, the meaning, applicability and legality of such bylaws. Thus, no union official can determine when he makes an expenditure in reliance on union bylaws whether some future jury will determine that the expenditure was nonetheless illegal under § 501(c).

A. The question of the respective duties and responsibilities of court and jury has generally arisen in the context of a claim that the jury has the right (as opposed to the power, by rendering a general verdict of acquittal) to determine the law for itself. But the leading case in this Court which confronted, and decisively rejected, that view

made clear also that the doctrine that the court must instruct the jury on the law, and the jury must accept those instructions, is essential to the liberty of the citizen. That case, of course, is *Sparf and Hansen v. United States*, 156 U.S. 51, where the Court said, in affirming the right and duty of the judge to instruct on the law:

> Public and private safety alike would be in peril, if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court and become a law unto themselves. * * * If because, generally speaking, it is the function of the jury to determine the guilt or innocence of the accused according to the evidence, of the truth or weight of which they are to judge, the court should be held bound to instruct them upon a point in respect to which there was no evidence whatever, or to forbear stating what the law is upon a given state of facts, the result would be that the enforcement of the law against criminals *and the protection of citizens against unjust and groundless prosecutions, would depend entirely upon juries uncontrolled by any settled, fixed, legal principles.* * * *
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> * * *
>
> We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence. *Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be. Under any other system, the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection equally of society and of individuals in their essential rights.* When that occurs our government will cease to be a government of laws, and become a government of men. Liberty regulated by law is the underlying principle of our institutions. [156 U.S. at 101-103, emphasis added]

The trial court's instructions recognized that the union bylaws were critical to the issues of the defendant's intent, which is an essential element of the offense under § 501(c), and directed the jury's attention to those bylaws (p. 6, *supra*). But the court refused to give the jury any guidance whatsoever as to which bylaws were applicable, although it had itself described as "complex, extended documents" (R.T. 2876) the three volumes of the International and local bylaws which the prosecution had introduced (p. 3, *supra*) and which were before the jury. Nor did the court either construe the bylaws as it had earlier promised (R.T. 2563), or inform the jury as to how the jury should interpret the bylaws in the light of the testimony at trial. The court's duty where the meaning of a written instrument is in issue was lucidly explained by Justice Brandeis:

> Where the controversy over the writing arises in a case which is being tried before a jury, the decision of the question of fact is left to the jury, with instructions from the court as to how the document shall be construed, if the jury finds that the alleged peculiar meaning or usage is established. [*Gt.No.Ry. v. Merchants Elev. Co.*, 259 U.S. 285, 291-292.][8]

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[8] Justice Brandeis preceded the foregoing with this explanation:

> When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law. But words are used sometimes in a peculiar meaning. Then extrinsic evidence may be necessary to determine the meaning of words appearing in the document. This is true where technical words or phrases not commonly understood are employed. Or extrinsic evidence may be necessary to establish a usage of trade or locality which attaches provisions not expressed in the language of the instrument. Where such a situation arises, and the peculiar meaning of words, or the existence of a usage, is proved by evidence, the function of construction is necessarily preceded by the determination of the matter of fact.

See also, *e.g.*, *United States v. Race*, 632 F.2d 1114, 1119-1120 (C.A. 4, 1980); *United States v. Lewis*, 592 F.2d 1282, 1284-1285 (C.A. 5, 1979); *Strauss v. United States*, 376 F.2d 416, 418-419 (C.A. 5, 1967).

Moreover, the defendant was entitled to have the jury instructed concerning the legality, under § 501(c), of the bylaws on which he relied. Such instructions were needed to protect the defendant in light of the prosecutor's repeated disparagement of the bylaws' legality before the jury and by the instruction which the court did give:

> Now, the bylaws may establish broad purposes for all kinds of different things that may be done for the benefit of the union. . . . But no matter how broad the bylaws may be in that regard, that does not mean that an officer can spend money for any old thing, . . . or for personal purposes of his own. [pp. 3a-4a *infra*]

While the Court of Appeals approved this instruction it did not explain how the jury was to determine whether a bylaw which authorized a particular expenditure was or was not lawful under that instruction, or how to differentiate a lawful expenditure from "any old thing" which was not a permissible union purpose.

In sum, the jury received the case without any instructions by the court concerning the law applicable to the bylaws which were critical to the defense.[9]

The jury manifested its need for precise instructions concerning the bylaws when, during the course of its deliberations, it asked that Mr. Brundage's testimony on this subject be read to it. But the trial court failed to

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[9] "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenbach v. United States*, 326 U.S. 607, 613. Thus, it is well settled that " 'a defendant is entitled to a charge which precisely and specifically, rather than merely generally or abstractly, points to the theory of his defense.' " *United States v. Wolfson*, 573 F.2d 216, 221 (C.A. 5, 1978), *quoting United States v. Gilbreath*, 452 F.2d 992, 994 (C.A. 5 1971); *see also, e.g., United States v. Miller*, 658 F.2d 235, 237 (C.A. 4, 1981); *Bradley v. United States*, 420 F.2d 181, 187-88 (C.A.D.C., 1969); *Apel* v. *United States*, 247 F.2d 277, 282 (C.A. 8, 1957).

exercise its "duty of special care" to give clear, specific and responsive supplementary instructions, "[p]articularly in a criminal trial, [since] the judge's last word is apt to be the decisive word." *Bollenbach v. United States*, 326 U.S. 607, 612.[10]

B. The nature of a prosecution under § 501(c) makes proper instructions concerning the union bylaws particularly essential; the Court of Appeals' affirmance despite their absence therefore has dangerous implications for all union officials whose duty it is to expend union funds.

We observed at the outset of our argument that the court's responsibility to charge the jury with respect to the law is essential to the liberty of the individual. That is a proposition with which Justice Black, whose confidence in juries was perhaps unparalleled among the members of this Court, nevertheless fully agreed. Writing for the court in *Giaccio v. Pennsylvania*, 382 U.S. 399, he struck down as violative of the Due Process Clause of the Fourteenth Amendment a state statute which empowered a jury which acquitted a defendant nonetheless to sentence him to pay the costs of the prosecu-

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[10] The judge told the jury that while they were entitled to hear the testimony, they should follow the judge's instructions rather than that testimony. Hearing that, the jury not surprisingly did not insist on its request. (See pp. 6-7, *supra*.) The Court of Appeals determined that the judge did not implicitly discredit Brundage's testimony (pp. 4a-5a, *infra*). Even if that is accepted, the court's supplementary instruction to which defendant objected (p. 7, *supra*) gave the jury no aid in deciding the case in light of that testimony. On the contrary, it made the jury's task more difficult. For the court at the least suggested to the jury that there was some inconsistency between the testimony and the instructions, but did not explain what that inconsistency was, and therefore the extent to which the jury could, consistent with law, credit that testimony. (Cf. Justice Brandeis' teachings in *Great Northern*, quoted at p. 13, n.8, *supra*.)

tion. The law provided no standards by which the jury was to make this determination. Justice Black wrote:

> It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. See, *e.g.*, *Lanzetta* v. *New Jersey*, 306 U.S. 451; *Baggett* v. *Bullitt*, 377 U.S. 360.
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> * * *
>
> Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce. This state Act as written does not even begin to meet this constitutional requirement. [382 U.S. at 402-403]

The failure to instruct the jury concerning the legal effect of the union bylaws subjected the defendant to the same hazard under 29 U.S.C. § 501(c) as did the Pennsylvania statute struck down in *Giaccio*. Section 501(c) does not forbid every use of the union monies by union officers or employees. If it did, unions could not function; for, like other organizations, they must spend monies to accomplish their objectives, and must do so by the action of their officers and other persons to whom they delegate that responsibility. Congress intended that the union constitution, bylaws and resolutions thereunder would provide the standard by which the legality of expenditures of union funds is to be determined.

Section 501(a) of the LMRDA, 29 U.S.C. § 501(a), which declares officers and other representatives of a

labor organization to be trustees in a relation to such organization and its members as a group, declares it to be:

> * * * the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, * * *.

And the legislative history leaves no doubt that these were intended to provide the standard for determining the legality of expenditures for purposes of § 501(c) as well. The authoritative statement is that of Representative O'Hara in describing Title V of the bill which was reported out of the House Committee on Education and Labor and which was identical to the Landrum-Griffin substitute which was adopted by the House, and enacted into law as Title V of the LMRDA. Mr. O'Hara said:

> The committee bill does not stop with an enumeration of membership rights. It provides other safeguards. Among them are the provisions of title V of the committee bill which punish embezzlement, theft or conversion of a union's funds by fine and imprisonment; which require that union officers be bonded to the faithful performance of their duties; which limit the total amount of money that may be loaned to union officers and employees; which prohibit a union from paying the fine of an officer or employee convicted of a violation of the act; which ban from union office and labor relations consultation Communists or persons convicted of certain crimes; and which spell out the fiduciary responsibility of officers and employees of labor organizations. The Landrum-Griffin substitute pays tribute to these antiracketeering and anticorruption provisions of the committee bill by incorporating their exact language in the substitute.

> Nor is it our intention that the courts, State or Federal, or any other Government agency, shall second guess union officers and employees on the question of whether a particular investment or expenditure is included within the "special problems and functions of a labor organization." *If it is made in accordance with, and for a purpose permitted by, the constitution, bylaws or regularly adopted resolutions of the union's constitutional governing bodies, the officer or employee will not be required at his peril to determine whether or not the constitution, bylaws or resolution goes beyond the legitimate purposes and objectives of the organization.* To do this would place them in an impossible position and would paralyze the legitimate operations of unions. *If an officer or employee of a labor organization failed to invest or expend the union's funds in accordance with the wishes of the membership, he would be guilty of a breach of his duties to the organization, and if he did act in accordance with their wishes, he might at some later time be told by a court of law that he breached the trust placed in him by doing so.* The intention of this section is simply that union officers and employees must act as the agents of the membership. They must conform their actions to the will of the membership, and they will be held strictly accountable for any loss to the organization or gain to themselves when they do not do so.[11]

By failing to instruct the jury as to the legal effect of the bylaws on which the defendant relied the courts below have subjected the defendant to precisely the "peril" against which he was to be protected. And, of course, if the decision below stands, all other union officials to whom § 501(c) applies will be subject to the same risk—that some jury, left at large to read the union bylaws for itself, will convict them on the ground that the expenditure

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[11] 105 Cong. Rec. 15690 (1959). See also 105 Cong. Rec. 17900 (1959) (Sen. John F. Kennedy).

was not for a union purpose as contemplated by those bylaws, or that this was not a purpose permitted by § 501(c).

II. The Court of Appeals' Ruling That the Prosecutor's Misconduct was "Harmless Error" Is Inconsistent with The Standards Adopted by This Court and Other Courts Of Appeals, and Raises an Important and Recurring Problem in the Fair Administration of Criminal Justice.

The Court of Appeals determined that the prosecutor had engaged in misconduct by "suggesting that the Nevada district judge [Judge Claiborne] had acted improperly in dismissing [a prior] case against Tham" (p. 10a, *infra*). But that Court nevertheless sustained petitioner's conviction on the ground "that it is more probable than not that the misconduct did not affect the verdict." (Amended opinion, p. 16, *infra*). This ruling should be reviewed because the Ninth Circuit's "more probable than not" standard [12] is more harsh to the defendant than the "harmless error" standard established by this Court. Moreover, the issue of when a conviction should be affirmed despite prosecutorial misconduct is of recurring importance to the administration of criminal justice because of the regrettable prevalence of such misconduct, against which at least three Courts of Appeals have been constrained to admonish, see pp. 22-23, *infra*.

A. The decision below is inconsistent with the general standard which this Court has established for determining when an error during the trial of a federal prosecution may be disregarded by an appellate court as "harmless". The Court undertook a thorough analysis of the subject in *Kotteakos v. United States*, 328 U.S. 750, where it concluded:

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[12] *See*, in addition to this case, *e.g.*, *United States v. Hall*, 650 F.2d 994, 998, n.6 (1981); *United States v. Berry*, 627 F.2d 193, 201 (1980); *United States v. Castillo*, 615 F.2d 878, 883 (1980).

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. * * * But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand. [328 U.S. at 764-765, footnote omitted.] [13]

"Under that standard when error is present in the record, the reviewing judge must set aside the verdict and judgment unless his 'conviction is sure that the error did not influence the jury, or had but very slight effect.'" *United States v. Agurs*, 427 U.S. 97, 112, quoting *Kotteakos*. The "more probable than not" test applied by the Ninth Circuit in its amended opinion herein is far more detrimental to the defendant than this Court's decisions permit. The difference, while clear from the words themselves, has been articulated with characteristic clarity by former Chief Justice Traynor of the Supreme Court of California in his book, *The Riddle of Harmless Error* (1970), which was summarized in *Government of Virgin Islands v. Toto*, 529 F.2d 278 (CA 3, 1976):

> [Chief Justice Traynor] suggests that an appellate court realistically has three options in choosing a

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[13] As Judge Friendly has written, "Although the 'harmless error' statute construed in *Kotteakos*, § 269 of the Judicial Code, see 328 U.S. at 757, has been replaced by 28 U.S.C. § 2111, the views expressed in *Kotteakos* remain authoritative." (*U.S. v. Frank*, 494 F.2d 145, 161, n.19 (CA 2, 1974)). His understanding is confirmed by this Court's decisions following *Kotteakos*, *e.g. United States v. Agurs*, 427 U.S. 97, 112; *Goldberg v. United States*, 425 U.S. 94, 111.

> standard for reviewing trial error. The reviewing court might affirm if it believes: (a) that it is *more probable than not* that the error did not affect the judgment, (b) that it is *highly probable* that the error did not contribute to the judgment, or (c) that it is *almost certain* that the error did not taint the judgment. Justice Traynor chooses the middle ground: "Unless the appellate court believes it highly probable that the error did not affect the judgment, it should reverse." R. Traynor, The Riddle of Harmless Error 35 (1970). [529 F.2d at 284, emphasis by Traynor, C.J., and the court.]

The Third Circuit, adopting Justice Traynor's formulation as a gloss on *Kotteakos*, reversed a conviction because it could not "say it is *highly probable* that the [error] did not contribute to the jury's judgment of conviction." (529 F.2d at 283, 284, court's emphasis). Thus, the decision below should be reviewed for the Court of Appeals' failure to follow the *Kotteakos* standard in determining that the prosecutorial misconduct here constituted harmless error.

B. When one moves from the question of the correct general rule concerning harmless error to the question of the correct rule for judging prosecutorial misconduct cases specifically, there is a further ground for review by this Court—a direct conflict of decisions among the courts of appeals.

The *Kotteakos* standard has been explicitly followed in reversing for prosecutorial misconduct by the District of Columbia Circuit. *United States v. Shelton*, 628 F.2d 54, 57-59 (CA DC, 1980). Cf. *United States v. Fowler*, 608 F.2d 2, 12 (CA DC, 1979, following *Kotteakos*, but affirming).[14]

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[14] *See also, e.g., United States v. Falk*, 605 F.2d 1005 (CA 7, 1979), where Judge Tone, whose vote was decisive, explained that he joined in affirmance because the "prosecutor's improper standards were harmless, judged by the standard set forth in *Kotteakos* * * *" (*id.* at 1014). But see Swygert, J., dissenting, *id.* at 1014-1016.

In the Eighth Circuit the test is whether "the jury verdict *could reasonably* have been affected by the improper argument." *United States v. Norton*, 639 F.2d 427, 429 (CA 8, 1981, emphasis added).

Other courts of appeals have gone further, applying the prosecutorial misconduct standard stated in *Chapman v. California*, 386 U.S. 18, for determining whether *constitutional* error is harmless. Thus, the Tenth Circuit recently said, "Where there is error, we must be able to conclude that such error was harmless beyond a reasonable doubt before we can affirm." *United States v. Polsinelli*, 649 F.2d 793, 797 (CA 10, 1981), citing *Chapman*, 386 U.S. at 20-24. Accord, *United States v. Millen*, 594 F.2d 1085, 1088 (CA 6, 1979) (following *Chapman* and reversing on one count, while affirming on other counts, "entirely upon the overwhelming nature of the proofs as to those offenses and the fact that, as to these counts, the prosecutorial abuse outlined above was harmless beyond reasonable doubt.").

C. The question of when prosecutorial misconduct should result in reversal of a conviction is also, unfortunately, a question of recurring importance in the administration of federal criminal justice. The Second Circuit has recently said:

> This appeal—like far too many reaching this Court—centers on improper statements made by a prosecutor in his summation to a jury. [*U.S. v. Modica*, 663 F.2d 1173, 1174 (C.A. 2, 1981).]

Likewise, Judge Harlington Wood, Jr., himself a former United States Attorney, recently began an opinion for the Seventh Circuit as follows:

> A federal prosecutor in final argument has done it again. A mere reading of a portion of the trial transcript makes clear that his comments on defendants' failure to testify violated their rights under the

> Fifth Amendment and 18 U.S.C. § 3481. [*United States v. Rodriguez*, 627 F.2d 110, 110 (C.A. 7, 1980).] [15]

In *U.S. v. Garza*, 608 F.2d 659, 661 (CA. 5, 1979), the Fifth Circuit said:

> This case presents nothing new—no new issue of law or unique factual configuration. It presents rather a situation far too common and too often condemned by this court to be in any manner excusable. We must deal again with grossly improper prosecutorial comment during closing argument which substantially prejudiced defendant's right to a fair trial on the evidence presented in his case.[16]

Given these judicial opinions, it cannot be denied that prosecutorial misconduct is a pervasive phenomenon in federal criminal trials, despite this Court's admonition that it "is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88. Prosecutorial misconduct not only reflects adversely on the process of criminal justice, but all too often deprives the defendant of a fair adjudication of his guilt or innocence. The gravity of the problem urgently calls for the exercise of this Court's supervisory powers, for the standards by which it is determined whether a conviction may stand despite such misconduct should both protect the defendant against foul blows, and discourage

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[15] See also *United States v. Falk*, *supra*, 605 F.2d at 1010-1011:

> Appellant's principal contention is that the prosecutor's closing argument went so far beyond the bounds of fair comment as to require a new trial. Similar contentions have been asserted and considered by this court in many cases.

[16] See also the Ninth Circuit cases cited at p. 19, n.12, *supra*, which, in addition to the present case, illustrate the prevalence of the problem in the Ninth Circuit.

prosecutors from inflicting them.[17] We do not contend that prosecutorial misconduct should call for automatic reversal. But we do say, in accord with the decisions cited at pp. 19-22, *supra*, that the standard by which the court below affirmed petitioner's conviction creates far too great a risk that a conviction will be sustained which was achieved by a prosecutor's unfair tactics.

It would also be desirable for the Court to give the lower courts more particularized guidance as to the methods for determining whether prosecutorial misconduct is prejudicial. In that connection, we urge specifically that the lower courts be instructed that they may not speculate, as the Court of Appeals did here, that the prosecutor missed his target. This Court said in *Berger:*

> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, [to refrain from improper tactics] which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. [295 U.S. at 88] [18]

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[17] As Chief Justice Traynor observed, any harmless error standard involves an assessment of probabilities. "Although *probable* is a word without fixed boundaries, it has become a manageable term in law because the courts can adjust the degree of belief required of the trier of fact according to the nature of the case." Traynor, *The Riddle of Harmless Error* (1970) pp. 33-3[illegible] (emphasis in original, footnote omitted). It is his thesis that a "harmless error" standard involves a similar assessment of probabilities by the appellate court (*id.* at 34-37). We agree, and submit that the "harmless error" standard, too, should serve "to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423. See also, *In re Winship*, 397 U.S. 358, 364 (Opinion of the Court), 370 (Harlan, J., concurring); *Woodby v. Immigration Service*, 385 U.S. 276, 284-286.

[18] The government should not "be heard to say that the methods which were used did not have the effect they were obviously in-

For this reason, and because of the transcending value of the defendant's liberty interest (cf. *In re Winship*, 397 U.S. 358, 364), what Justice Roberts wrote for a unanimous court in reversing a plaintiff's conviction in an FELA case applies with even greater force here:

> In actions under the federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent. [*Minneapolis Etc. Ry. v. Moquin*, 283 U.S. 520, 521-22]

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE KAUFMANN
(Counsel of Record)
WOODY N. PETERSON
MARK A. PACKMAN
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for Petitioner

Of Counsel:
JOHN E. MILONAS
459 Fulton Street
San Francisco, CA 94102

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tended to have." *United States v. Crawford*, 438 F.2d 441, 445 (CA 8, 1971); *United States v. Pennix*, 313 F.2d 524, 531 (CA 4, 1963).

Appendix

APPENDIX A

OPINION OF THE COURT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICHAEL RUDY THAM,
Defendant-Appellant.

No. 80-1362

United States Court of Appeals, Ninth Circuit

Argued and Submitted May 12, 1981
Decided Oct. 5, 1981

Appeal from the United States District Court for the Northern District of California.

Before CHOY and WALLACE, Circuit Judges and WYATT,* District Judge.

WALLACE, Circuit Judge:

Tham appeals from a conviction on 15 counts of embezzlement of union assets, 29 U.S.C. § 501(c), and 4 counts of false entry in union records, 29 U.S.C. § 439(c). He was ordered to spend six months in prison, pay $50,000 in fines, and he was placed on probation for four years. One of the conditions of probation was that he make restitution to the union. We affirm.

I

Tham was Secretary-Treasurer, the chief executive officer, of Local 856 of the Freight Checkers, Clerical Employees and Helpers Union, an affiliate of the International Brotherhood of Teamsters. Tham was also a member of several local and national Teamster committees. The government charged that Tham used union funds for non-union purposes, and made false entries in union records concerning those expenses.

The government alleged that Tham spent union funds on travel and entertainment expenses in Lake Tahoe and New York and that most of the expenditures were made on behalf of Aladena (Jimmy) Fratianno. The government also alleged that Tham spent union funds on gifts and entertainment for other friends not related to union business. Tham concedes that these expenditures were made, and that they were made from union funds. He claims, however, that the funds were spent on union business. Specifically, he contends that he spent money on Fratianno because Fratianno was attempting to develop eye and dental care plans suitable for the union. Tham argues that the union's bylaws permitted him to spend union funds on entertainment and travel that would bene-

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* Honorable Inzer B. Wyatt, United States District Judge, Southern District of New York, sitting by designation.

fit the union, directly or indirectly, and that his expenditures fell within those permitted by the bylaws.

II

Tham first contends that the district judge erred in failing to instruct the jury concerning the specific provisions of the bylaws that Tham claims authorized him to spend union funds in the way he asserts he did. In his brief, Tham summarizes his argument as follows: "The critical factual issue for the jury to determine was whether [Tham] had a good-faith belief that his expenditures were for the benefit of the union." Tham argues that his good-faith belief was established by his adherence to the bylaws of the union. Thus, he asserts that the judge should have instructed the jury on the specific bylaws.

[1] The district judge gave the following pertinent instructions to the jury:

> [T]he government must prove beyond a reasonable doubt that the defendant did not have a good-faith belief that the union funds were spent for the benefit of the union. Unless you are convinced beyond a reasonable doubt that the defendant lacked a good-faith belief that the expenditure of the funds was for the benefit of the union, then an embezzlement, theft, abstraction or conversion would not have occurred within the meaning of the law.
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> * * * *
>
> In evaluating the defendant's intent, you may consider whether or not he acted in good faith under the applicable provisions of the international constitution and bylaws of Local 856, which are in evidence before you.
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> * * * *
>
> Now, the bylaws may establish broad purposes for all kinds of different things that may be done for the benefit of the union. . . . But no matter how

> broad the bylaws may be in that regard, that does not mean that an officer can spend money for any old thing, . . . or for personal purposes of his own.

These instructions constitute an accurate statement of the law. The judge adequately covered Tham's theory of the case by instructing that the jury could consider the bylaws in determining whether Tham held a good-faith belief that he was using the funds for a union purpose. It was not an abuse of discretion for the district judge to refuse to read the specific bylaws to the jury, or to instruct the jury about those specific bylaws. *See United States v. Shelton*, 588 F.2d 1242, 1252 (9th Cir. 1978), *cert. denied*, 442 U.S. 909, 99 S.Ct. 2822, 61 L.Ed.2d 275 (1979).

[2, 3] Tham raises a related issue concerning the district judge's supplementary instruction in response to the jury's request to have certain testimony reread to them. A witness called by Tham, Albert Brundage, a labor lawyer who had participated in the drafting of the bylaws, testified concerning the applicable provisions of the bylaws and the chief executive officer's discretion to interpret them. The jury requested that Brundage's testimony be read to them. The government expressed concern that the jury would infer that the law was as Brundage stated it, not as the court instructed. The district judge instructed the jury that they were entitled to hear the testimony, but that they should follow the court's instructionse concerning the law, not Brundage's exposition of the law. The judge then asked the jury whether they still wanted to hear the testimony, indicating that it was perfectly all right if they did. The jury then withdrew its request to hear the testimony.

The response to a request for additional instructions rests with the discretion of the district judge. *United States v. Collom*, 614 F.2d 624, 631 (9th Cir. 1979), *cert. denied*, 446 U.S. 923, 100 S.Ct. 1862, 64 L.Ed.2d 278 (1980). Tham argues that the instruction implicitly dis-

credited Brundage's testimony by indicating that the testimony was inconsistent with the law. This is not a reasonable inference to draw from the instruction. Rather, the instruction merely indicated that to the extent there was any discrepancy, the jury was to follow the court's instructions. This is hardly, as Tham characterizes it, "coercive." The district judge made it clear that the jury could hear the testimony if it still found the testimony worthwhile in light of the court's cautionary instruction. No abuse of discretion was demonstrated.

III

Tham contends that the district court erred in failing to order the government to disclose the identity of a confidential informant, or in failing to require an *in camera* examination of the informant. The informant, identified only as Source Four, stated in an affidavit used as a basis for a wiretap application in a related investigation that he overheard Tham, Fratianno, and Tommy Marson discussing an eye care plan that they were promoting with regard to unions on the West Coast. This discussion took place at a concert in Tarrytown, New York. Tham's travel and entertainment expenses for this concert and trip to New York are the basis of one of the counts of the indictment before us.

Tham argues that Source Four's information that he was discussing an eye care plan is exculpatory. He contends that if he was in fact discussing an eye care plan with Fratianno at this concert, he was spending union funds to benefit the union. Tham claims that it was crucial to his defense to have the opportunity to interview Source Four.

During trial, Tham moved for disclosure or an *in camera* interview of Source Four. Rather than agree to this, the government offered to stipulate to the truth of the statements made by Source Four in his affidavit. The parties then stipulated that Tham, Fratianno, and Marson

had been at the particular concert "and discussed an eye care plan they were promoting at that time with regard to unions on the West Coast." Based upon that, the district court denied Tham's motions.

Despite the stipulation, Fratianno, as a government witness, continued to deny that there was any discussion at that concert about an eye care plan for the benefit of the unions. Rather, he contended that if there was any discussion similar to this, it concerned the setting up of a private contact lens enterprise. Both sides questioned Fratianno about his recollection of this conversation. In addition, during closing argument, the prosecutor argued that even if there was discussion at that concert about an eye care plan, this was a minor incident over a long period of time. He emphasized Fratianno's testimony that he was not involved in an eye care plan, but with a contact lens venture. Over Tham's objection, the district court permitted this argument stating that "on this particular point his argument is proper." Subsequently, the prosecutor argued that the stipulation could be interpreted to mean that the parties discussed the contact lens venture, rather than a union eye care plan at the concert. Tham interposed an objection to this argument which was sustained. The district court later instructed the jury that a stipulation must be accepted as a proven fact.

[4] Tham's continued contention that the identity of Source Four must be revealed is without merit. The government is entitled "to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." *Roviaro v. United States*, 353 U.S. 53, 59, 77 S.Ct. 623, 627, 1 L.Ed.2d 639 (1957). This privilege must give way, however, "[w]here the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense . . . ." *Id.* at 60-61, 77 S.Ct. at 627-28. The district judge, in his discretion, must

balance the government's interest in non-disclosure with the defendant's interest in obtaining evidence. *United States v. Anderson*, 509 F.2d 724, 729 (9th Cir.), *cert. denied*, 420 U.S. 910, 95 S.Ct. 831, 42 L.Ed.2d 840 (1975). The defendant has the burden of showing the need for disclosure. *United States v. Prueitt*, 540 F.2d 995, 1004 (9th Cir. 1976), *cert. denied*, 429 U.S. 1063, 97 S.Ct. 790, 50 L.Ed.2d 780 (1977).

[5] In the case before us, the district judge did not abuse his discretion in ruling that Tham failed to meet his burden. Tham sought disclosure of Source Four's identity to examine him about the conversation at the concert. The stipulation was the most favorable evidence Tham could have secured concerning that conversation. As a result of the stipulation, it became a proven fact that a conversation concerning a union eye care plan had taken place. Tham has not shown how the disclosure of Source Four's identity would have been of any assistance to his case. That any information that Source Four might have provided might have been useful to Tham is no more than speculation, which is insufficient to require disclosure or an *in camera* hearing. *See United States v. Kim*, 577 F.2d 473, 478-79 (9th Cir. 1978).

Our analysis is not changed by the prosecutor's so-called "attacks" on the stipulation. After the parties entered into the stipulation, both sides continued to elicit testimony from both Fratianno and Tham pertaining to the conversation at the concert. Neither side objected, even though the existence of a conversation concerning a union eye care plan was already a proven fact. Indeed, Fratianno's continued testimony that there was no discussion about an eye care plan at that concert could only benefit Tham as Fratianno's testimony was contrary to facts the government had already conceded. In addition, because the district judge sustained Tham's objections, Tham's complaint about the prosecutor's statements in closing argument is meritless. The district judge ade-

quately instructed the jury pertaining to the impropriety of the prosecutor's statements, and later adequately instructed the jury concerning the proper treatment of the stipulation.

We conclude that the district judge did not abuse his discretion in failing to require the government to disclose the identity of Source Four, or to require an *in camera* examination of Source Four.

IV

Tham alleges two instances of prosecutorial misconduct that he claims warrant reversal. First, he contends that the prosecutor improperly suggested that Tham had "fixed" an earlier case in which he was a defendant. Second, Tham claims that the prosecutor made improper statements during closing argument.

[6] In assessing claims of prosecutorial misconduct, we must determine whether such misconduct occurred, whether the defendant properly preserved the issue for appeal, and whether the defendant was prejudiced by the misconduct. *United States v. Berry*, 627 F.2d 193, 196-97 (9th Cir. 1980), *cert. denied*, —— U.S. ——, 101 S.Ct. 925, 66 L.Ed2d 843 (1981). In making these determinations, particularly the last one, we must ordinarily give great deference to the district judge's handling of the alleged misconduct during the trial. The district judge is ordinarily in a much better position to understand the circumstances surrounding the alleged misconduct and to evaluate its impact. *See Orebo v. United States*, 293 F.2d 747, 749 (9th Cir. 1961), *cert. denied*, 368 U.S. 958, 82 S.Ct. 402, 7 L.Ed.2d 389 (1962). In addition, allegations of prosecutorial misconduct, including the allegations made here, are ordinarily not of constitutional dimension. Therefore, even if we find prosecutorial misconduct, we will reverse only if we determine that it is more probable than not that the misconduct materially affected the verdict. *United States v. Valle-Valdez*, 554 F.2d 911, 915-16 (9th Cir. 1977).

A.

Several weeks before trial in this case, Tham had been tried in the district court in Nevada. The prosecutor in that case was the same as the prosecutor in this case. Prior to trial in the Nevada case, the prosecutor apprised the Nevada district judge that there had apparently been some prior contact between the Nevada district judge and Tham. Before the Nevada district judge was appointed to the bench, he had apparently contacted Tham in an effort to have his stepson placed in a truck driving job. Evidently, Tham was unable to be of assistance. The prosecutor claimed that he raised this issue simply because he was afraid that there might be some hard feelings between Tham and the Nevada district judge which might result in a collateral attack on any conviction in the case. The prosecutor said at that time that he was satisfied that there was no impropriety. At the close of evidence in that case, the Nevada district judge granted Tham's motion for a judgment of acquittal.

In the case before us, the district judge ruled that the disposition of the Nevada case was inadmissible. Despite that ruling, made in Tham's presence, Tham made the following statement during cross-examination, not in response to any question:

> Didn't you take me to [Nevada] and I got acquitted up there in [Nevada] because of a violation of the Labor Act? Didn't I get acquitted up there? Didn't the judge say it was a sick trial, didn't he throw it out?

Shortly thereafter, the prosecutor asked Tham if he had known the Nevada district judge before the trial commenced, and if he had ever done a favor for the Nevada district judge. After an objection, the prosecutor again asked Tham whether he had done a favor for the Nevada district judge before the judge had been appointed to the bench, whether he had ever gotten the Nevada dis-

trict judge's son a job or gotten him into school, or whether he had ever talked to him. Tham's counsel objected, and subsequently moved for a mistrial. The basis for the mistrial motion was that the inference to be drawn from the prosecutor's questions was that Tham had improperly attempted to influence his Nevada case. The district judge denied the motion, stating that Tham's counsel had exaggerated the importance of the prosecutor's questions, and that in any event Tham had invited the questions by his improper mention of the disposition of the Nevada case. Subsequently, the district judge instructed the jury that the Nevada case was irrelevant, and that the jury was to disregard everything that had been said about the case.

[7] Tham did invite questions about the Nevada prosecution by his unwarranted raising of his acquittal. His invitation, however, did not extend to a suggestion that Tham's acquittal was caused by improper conduct by the Nevada district judge. Although the prosecutor knew that there had been contact between Tham and the Nevada district judge, he had no basis on which to ask whether Tham had ever done a favor for the Nevada district judge. It was clear from the context of the question that the prosecutor was suggesting that the Nevada district judge had acted improperly in dismissing the case against Tham. Thus, the prosecutor was guilty of misconduct in asking this question. In addition, Tham's counsel adequately preserved this issue for appeal.

We conclude, however, that there is no sufficient showing of prejudice to warrant reversal. Tham argues that the clear inference to be drawn from the prosecutor's questions is that Tham was involved in improperly influencing the Nevada case. The district judge in this case, who thought that Tham's counsel was exaggerating the importance of the prosecutor's questions, did not agree. It is doubtful that a reasonable juror would have believed that Tham had acted improperly by the fact

that he had received a phone call from an attorney who subsequently became a district judge. If any impropriety could be remotely inferred, it would be on the part of the Nevada district judge, not Tham. Therefore, the district judge did not abuse his discretion in denying the motion for a mistrial. We do not conclude that it was more probable than not that the misconduct materially affected the jury's verdict.

B.

Tham contends that the prosecutor's closing argument was improper in two respects that require reversal. First, Tham claims that the prosecutor improperly vouched for Fratianno's credibility. Second, Tham argues that the prosecutor improperly stated that the indictment had the imprimatur of the Grand Jury, the United States Attorney, and by their nomination and confirmation of the United States Attorney, the President and the Senate.

During the rebuttal portion of his closing argument, the prosecutor argued that Fratianno had a motive for telling the truth because his plea agreement obligated him to do so. The prosecutor argued that if Fratianno violated his plea agreement by lying, he would be subject to several prosecutions for murder, with the possibility of the dealth penalty.

Tham asks us to compare the argument in this case with the argument in *United States v. Roberts*, 618 F.2d 530 (9th Cir. 1980), in which we reversed a conviction because of an improper closing argument. We have compared these two arguments, and find them easily distinguishable. In *Roberts*, the basis of the reversal was that the prosecutor had argued not only that the government witness was bound to tell the truth by his plea agreement, but, without any evidence in the record, he also argued that there was a government agent in the courtroom during the trial to monitor the witness's testimony. *Id.* at 533-34. In contrast, in the case before us, there is no contention that the prosecutor argued facts

that were not in evidence. Therefore, neither the holding nor the reasoning of *Roberts* applies to this case.

In *Roberts*, we went on to add dicta to provide guidance for the district court in the event of a retrial. We discussed the admissibility of a plea agreement promise of truthfulness, and the use of such a promise, once admitted, in closing argument. In the case before us, the issue of the admissibility of the plea agreement has not been presented.

In *Roberts*, we stated that it is improper for a prosecutor to "invite the jury to rely on the government's assessment that the witness is testifying truthfully." *Id.* at 536. A prosecutor commits misconduct if the jury can reasonably believe that he "was indicating a personal belief in the witness's credibility." *Id.* at 537.

[8] The argument in the case before us is distinguishable. First, the prosecutor's argument was in rebuttal to the defense counsel's closing argument that attacked Fratianno's credibility. Tham's counsel argued that the plea agreement required Fratianno not to testify truthfully, but to testify favorably to the government. When Tham's counsel argued the motivation of a witness testifying under immunity, it was proper for the prosecutor to rebut that argument by arguing the language of the plea agreement and how it might affect the witness's motivation. Second, the district judge admonished the jury to treat the testimony of a witness testifying under immunity "with greater care than the testimony of an ordinary witness." The district judge pointed out to the jury that such a witness might have a motive to falsify his testimony to further his own interest. Under these circumstances, the prosecutor's argument, offered in rebuttal, pertaining to the effect of the plea agreement on Fratianno's testimony does not run afoul of the *Roberts* dicta.

[9] The second aspect of the prosecutor's closing argument about which Tham complains is the prosecutor's reference to the participation of others in the charges against Tham. Tham's counsel, in his closing argument, contended that "what this case is about, and all it is about, is one prosecutor with one legal theory, trying it out to get Rudy Tham." His closing argument is replete with suggestions that there would be no case against Tham but for a personal vendetta held by the prosecutor against Tham. In *United States v. Polizzi*, 500 F.2d 856, 889-90 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120, 95 S.Ct. 802, 42 L.Ed.2d 820 (1975), we held that a prosecutor's reference to the fact that a grand jury had passed on the indictment was proper when made in response to the defense counsel's charge that the prosecutor was pursuing a personal vendetta against the defendant. Tham has not cited *Polizzi*, much less distinguished it. We see no material distinction between our holding in that case and the issue presented in this case. Therefore, we reject Tham's contention that this aspect of the prosecutor's closing argument was improper.

V

Tham's final contention is that the district court erred in failing to dismiss the indictment because of the government's failure to provide the Grand Jury with certain information. Tham argues the government should have read the union bylaws, which Tham claims were exculpatory, to the Grand Jury, should have provided the Grand Jury with evidence of Fratianno's lack of credibility, and should have presented Fratianno's testimony live, rather than by means of a transcript of earlier Grand Jury testimony.

[10, 11] Tham's contentions are meritless. The general rule in this circuit is that no independent inquiry will be made into the kind of evidence presented to a grand jury, when a duly constituted grand jury returns

an indictment valid on its face. *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974). We have held that a grand jury need not be advised of all matters concerning credibility, and that dismissal of the indictment is only required in extreme situations, as where the prosecutor knowingly presents perjured testimony. *United States v. Thompson*, 576 F.2d 784, 786 (9th Cir. 1978). No such situation exists in the instant case.

AFFIRMED.

APPENDIX B

ORDER AMENDING OPINION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80-1362

D.C. No. CR 79-349 SAW

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

MICHAEL RUDY THAM,
Defendant-Appellant.

AMENDMENT OF OPINION

Appeal from the United States District Court
for the Northern District of California

Before: CHOY and WALLACE, Circuit Judges, and WYATT,* District Judge.

The Opinion filed in the above matter on October 5, 1981, is amended as follows:

For the final sentence on page 5005, beginning "Therefore, . . . ," substitute:

> Therefore, if we find prosecutorial misconduct, we will reverse unless it is more probable than not that the misconduct did not materially affect the verdict. [Same cite.]

For the final sentence on page 5006, beginning "We conclude, however, . . .," substitute:

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* Honorable Inzer B. Wyatt, United States District Judge, Southern District of New York, sitting by designation.

> We conclude, however, that it is more probable than not that the misconduct did not affect the verdict.

Eliminate the last sentence of the paragraph which ends before subsection B on page 5007, *i.e.*, "We do not conclude . . . ."

APPENDIX C

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80-1362

D.C. No. CR 79-349 SAW

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MICHAEL RUDY THAM,
Defendant-Appellant.

ORDER

Appeal from the United States District Court
for Northern District of California

Before: CHOY and WALLACE, Circuit Judges, and WYATT,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable Inzer B. Wyatt, United States District Judge, Southern District of New York, sitting by designation.

APPENDIX D

STATUTES AND RULES INVOLVED

Section 501 of the Labor-Management Reporting and Disclosure Act of 1959, Pub.L. 86-257, Sept. 14, 1959, 73 Stat. 519, 535 provides as follows:

> § 501. Fiduciary responsibility of officers of labor organizations
>
> (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.
>
> (b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a)

of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

(c) Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

The "harmless error" statute, 28 U.S.C. § 2111, provides as follows:

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Rule 30 of the Federal Rules of Criminal Procedure provides in pertinent part as follows:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests.
>
> * * *

Rule 52(a) of the Federal Rules of Criminal Procedure provides as follows:

> Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

Opposition

Supreme Court, U.S.
FILED
APR 2 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1538

In the Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL RUDY THAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

VINCENT L. GAMBALE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the district court erred in failing to give petitioner's proposed jury instructions concerning union bylaws applicable to the case.

2. Whether the court of appeals used an incorrect standard in determining that the prosecutor's misconduct at trial constituted harmless error.

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In the Supreme Court of the United States

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MICHAEL RUDY THAM, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 665 F.2d 855.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1981. A petition for rehearing was denied on December 16, 1981 (Pet. App. 17a). The petition for a writ of certiorari was filed on February 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California,

petitioner was convicted on 15 counts of embezzling union funds, in violation of 29 U.S.C. 501(c), and on four counts of making false entries in union records, in violation of 29 U.S.C. 439(c) (Pet. App. 2a). Petitioner was sentenced to six months' imprisonment and four years' probation, and was fined a total of $50,000 (*ibid.*). The court of appeals affirmed (Pet. App. 1a-14a).

1. Petitioner was charged with spending union funds for nonunion purposes and making false record entries pertaining to some of those expenditures (Pet. App. 2a). The evidence at trial established that between 1975 and 1978, petitioner served as the chief executive officer of Local 856 of the Freight Checkers, Clerical Employees and Helpers Union in San Francisco—an affiliate of the International Brotherhood of Teamsters (*ibid.*). During that period, petitioner used union funds to pay personal travel and entertainment expenses of Aladena (Jimmy) Fratianno,[1] or to pay expenses incurred in connection with various non-union activities in which he and Fratianno were involved.

For example, in December 1976, petitioner and Fratianno went to New York City for three days to purchase inventory for a retail clothing store they had recently opened in San Francisco (Tr. 446-454). Although they conducted no union business in New York, petitioner used union funds to pay Fratianno's hotel bill (Tr. 455-460). A few months later, in March 1977, petitioner, Fratianno, and two female companions took a weekend trip to Lake Tahoe to

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[1] Fratianno, a self-confessed La Cosa Nostra "hitman," testified for the government pursuant to a plea-bargain regarding his wide-ranging criminal activities (Tr. 390-400).

attend a Frank Sinatra concert. Petitioner paid their hotel bills with union funds (Tr. 481-488). Petitioner and Fratianno went to New York again in May 1977 to attend another Sinatra concert and to buy additional inventory for their clothing store.[2] Once again petitioner paid Fratianno's hotel expenses with union funds (Tr. 597-602).

In 1976, petitioner used union funds for hotel rooms in San Francisco for an associate of his and for Fratianno (Gov't Exhs. 3A-3D; Tr. 254-257, 436-438, 1111-1113). Petitioner falsely attributed those expenses in union records to union affairs (Tr. 254-255, 416, 420-421, 1113-1117, 1129-1130). That summer, petitioner used union funds to buy dinner for Fratianno and two men with whom petitioner planned to open a state-licensed card room in California (Tr. 440-446). Similarly, about eight months later, petitioner bought dinner with union funds for Fratianno, two associates of Fratianno, and a New Orleans man with whom petitioner and Fratianno were planning to start a shipping business (Tr. 465-471, 926-932). And in June 1977, petitioner used union funds to pay the dinner and hotel expenses of a friend of Fratianno in connection with another proposed business venture. Petitioner had false entries made in union records to show that those June 1977 expenses were related to union organizing (Gov't Exh. 15; Tr. 307-308, 601-606, 947-949, 959-960).

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[2] The only incident during this trip that involved union affairs occurred at the concert hall when petitioner, Fratianno, and one of their associates "discussed an eye care plan they were promoting at that time with regard to unions on the West Coast" (Gov't Exh. 38 (Stipulation); Tr. 602, 857, 902-903, 924-925).

ARGUMENT

1. There was no dispute at trial that petitioner had used union funds to pay the expenses in question (Pet. App. 2a). The defense rested on petitioner's claim that he made these expenditures in the good-faith belief that they were for the union's benefit and that they were therefore authorized by the union's bylaws (*id.* at 2a-3a). Petitioner essentially contends (Pet. 11-19) that his defense was improperly impaired because the district court failed to instruct the jury on which specific provisions of the bylaws were applicable to the expenditures at issue and failed to instruct the jury that those provisions comply with 29 U.S.C. 501(c). This contention is baseless.

a. The union bylaws on which petitioner relied were introduced into evidence by the government (Gov't Exhs. 22A-22C; Tr. 129-130) and were read and explained to the jury during the testimony of three defense witnesses, including petitioner (see, *e.g.*, Tr. 1457-1467, 1878-1879, 1894-1903, 2568-2572, 2610-2611). In addition, the specific bylaws on which petitioner relied were reviewed in detail by defense counsel during opening and closing remarks to the jury (Tr. 113-114, 3012-3014).[3]

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[3]Although a number of the provisions of the bylaws and constitution were read to the jury, the defense relied primarily on provisions in the bylaws stating that it is an objective of the union "to engage in cultural, civic, legislative, political, fraternal, educational, charitable, welfare, social and other activities which further the interests of [the union] and its membership, directly or indirectly" and to "expend or otherwise use [union] funds * * * to carry out the duties [and] to achieve the objectives set forth in [the bylaws and constitution] and for such additional purposes and objects not incon-

Regarding the bylaws, the district court instructed the jury as follows (Pet. App. 3a-4a):

> [T]he government must prove beyond a reasonable doubt that the defendant did not have a good-faith belief that the union funds were spent for the benefit of the union. Unless you are convinced beyond a reasonable doubt that the defendant lacked a good-faith belief that the expenditure of the funds was for the benefit of the union, then an embezzlement, theft, abstraction or conversion would not have occurred within the meaning of the law.
>
> * * * * *
>
> In evaluating the defendant's intent, you may consider whether or not he acted in good faith under the applicable provisions of the international constitution and bylaws of Local 856, which are in evidence before you.
>
> * * * * *
>
> Now, the bylaws may establish broad purposes for all kinds of different things that may be done for the benefit of the union * * *. But no matter how broad the bylaws may be in that regard, that does not mean that an officer can spend money for any old thing, * * * or for personal purposes of his own.

The court of appeals concluded (*id.* at 4a) that these instructions constituted an accurate statement of the law (a point petitioner does not dispute) and that they adequately covered petitioner's theory of the case by permitting the jury to "consider the bylaws in determining whether [petitioner] held a good-

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sistent therewith as will further the interests of [the union] and its members, directly or indirectly" (Gov't Exhs. 22A-22C; Tr. 3012).

faith belief that he was using the funds for a union purpose." The court therefore correctly held (*ibid.*) that the district court did not abuse its discretion in refusing to read specific bylaws to the jury "or to instruct the jury about those specific bylaws." See *United States* v. *Hudler*, 605 F.2d 488, 490 (10th Cir. 1979), cert. denied, 445 U.S. 961 (1980); *United States* v. *Wedelstedt*, 589 F.2d 339, 349 (8th Cir. 1978), cert. denied, 442 U.S. 916 (1979).

b. Nor is there any merit to petitioner's claim (Pet. 14) that "the prosecutor's repeated disparagement of the bylaws' legality before the jury" required the district court to give his proposed instruction that the bylaws comply with federal law. During the discussion at trial about such a proposed instruction, the court observed that the issue in the case "is not whether or not the bylaws are lawful but whether or not [petitioner's] expenditures are lawful," that is, whether they were made "in good faith for the benefit of the union" (Tr. 2879, 2886). Although petitioner agreed with that observation (*ibid.*), he argued that an instruction that the bylaws do not conflict with federal law was necessary because of the prosecutor's "suggestions" that the bylaws are "exculpatory provisions" under 29 U.S.C. 501(a) and that Section "501(c) is the ultimate arbiter" of the propriety of union expenditures, and because the prosecutor *might* argue to the jury that the bylaws conflicted with Section 501 (Tr. 2874-2888).

Under Section 501(a), union officers have a fiduciary duty to their membership to expend union money only for the union's benefit, and any "general exculpatory provision" in the union's bylaws purporting to relieve the officers of their fiduciary duty is void.

At trial, defense witnesses Michael J. McLaughlin, staff attorney for Local 856, and labor lawyer Albert Brundage were cross-examined about the Section 501(a) prohibition of "exculpatory provision[s]." There was no suggestion during that questioning, however, that the bylaws that petitioner claimed authorized his expenditures constituted exculpatory provisions. The prosecutor's questions on that topic related to a "hypothetical" bylaw allowing an officer to spend union money for purely personal purposes. McLaughlin, Brundage, and even petitioner agreed that such a "hypothetical bylaw" would conflict with Section 501(a), but they stressed that Local 856's bylaws fully conformed to the statute (Tr. 1529, 1548-1550, 2143-2147, 2173, 2591, 2604-2611).

In agreeing that, under Section 501(c), no union bylaw could authorize a union officer to spend money for personal purposes, petitioner and his witnesses necessarily also agreed (Tr. 1550, 2173, 2605-2607) that Section 501(c) is the ultimate authority governing the legality of union expenses, *i.e.*, that regardless of what any Local 856 bylaw said, personal expenditures would be unlawful. Because that was the only point established through the prosecutor's questions respecting the hypothetical bylaw, the district court was correct in its observation (Tr. 2885) that "[t]here is no contention before [the jury] that the bylaws of Local 856 * * * are unlawful"; it therefore did not abuse its discretion in refusing petitioner's request for an instruction on the legality of particular Local 856 bylaws, and it is hard to see how the omission of such an instruction could have prejudiced petitioner.[4]

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[4] We note also that, while the prosecutor did not argue that the union's bylaws conflicted with Section 501, petitioner

c. Similarly, contrary to petitioner's suggestion (Pet. 14-15) with respect to the jury's request that the testimony of lawyer Brundage[5] be read to it, the district court neither erred nor prejudiced petitioner's defense when it responded (Tr. 3179) that the jury was entitled to hear the testimony but that, to the extent that Mr. Brundage's "exposition of what he considered to be the law" might have differed in any respect from the court's instructions, the jury was bound to follow the instructions. By this response the district court neither denied the jury the option of hearing the testimony nor implied that the testimony actually was inconsistent with the court's instructions. In any event, since Brundage testified (Tr. 2571-2572, 2610-2611) that bylaws could authorize only expenditures that benefited the union and that, in deciding whether particular expenditures were lawful, a union officer had a fiduciary duty to make a reasonable, good faith judgment as to whether the expenditures actually benefited the union, he was in substantial agreement with the court's instructions on the law. Thus, in reminding the jury that it must follow those instructions (set forth at page 5, *supra*), the court was, in effect, advising them to follow a view of the law that peti-

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argued to the jury that "[t]here is nothing about [the union's] bylaws at all that conflict with the law" and that "[t]hey are in full conformity with the law" (Tr. 3013).

[5] Brundage, who had helped draft the "Model Bylaws" on which the bylaws of Local 856 were based, was the principal defense witness regarding the bylaws that petitioner claimed authorized the expenditures in question (Pet. App. 4a). Contrary to petitioner's suggestion (Pet. 6), however, the jurors did not ask to hear Brundage's testimony "concerning the bylaws"; their request was simply to hear "the testimony of Mr. Brundage" (Tr. 3177).

tioner had himself put forward through his witness Brundage.

2. Petitioner contends (Pet. 19-25) that the court of appeals failed "to follow the *Kotteakos* [6] standard in determining that * * * prosecutorial misconduct [at trial] constituted harmless error" (*id.* at 21). This contention is groundless.

The court of appeals held (Pet. App. 10a) that the trial prosecutor "was guilty of misconduct" in suggesting on cross-examination of petitioner that a Nevada district judge had acted improperly in dismissing a prior criminal case against petitioner, notwithstanding the fact that the prosecutor's remarks followed testimony by petitioner, not in response to any question, that he had been acquitted in Nevada of a "Labor Act" charge (*id.* at 9a).[7] The court con-

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[6] *Kotteakos* v. *United States*, 328 U.S. 750 (1946).

[7] The court of appeals outlines in detail (Pet. App. 9a-10a) the misconduct incident and its background. Briefly, during the Nevada case, which the same prosecutor had tried, the prosecutor had discussed with the judge an incident preceding the judge's appointment to the bench in which [petitioner] had been asked to obtain a job for the judge's stepson, but was unable to do so. The prosecutor had indicated that he saw no impropriety in the judge's hearing the case, which ended with a grant by the judge of petitioner's motion for acquittal. When, in the trial in this case, petitioner—through a spontaneous series of rhetorical questions—informed the jury that he had been acquitted and claimed that the Nevada judge had said "it was a sick trial" (*id.* at 9a), the prosecutor responded by twice asking petitioner whether he had ever done a favor for the Nevada judge, qualifying it the second time by asking whether he had done a favor for the judge prior to the judge's appointment, "when he was an attorney in Las Vegas" (Tr. 2136). The prosecutor further inquired (*ibid.*) whether petitioner had secured a job for the judge's son "in the truck driving school in Oakland" and whether he had ever "had any communications with [the judge] when he was an attorney at all."

cluded (Pet. App. 10a-11a, 16a), however, that the district judge did not abuse his discretion in denying a mistrial because "it is more probable than not that the misconduct did not affect the verdict." Echoing the district court, which had found petitioner's view of the importance of the prosecutor's remarks "exaggerated," the court of appeals rejected (Pet. App. 10a) petitioner's argument that "the clear inference to be drawn" from the prosecutor's remarks was that petitioner "had been involved in improperly influencing the Nevada case." The court of appeals concluded instead (*id.* at 10a-11a) that no "reasonable juror would have believed that [petitioner] had acted improperly by the fact that he had received a phone call from an attorney who subsequently became a district judge."

Under the harmless error test employed by the court below, reversal for prosecutorial misconduct is required unless "it is more probable than not that the misconduct did not affect the verdict" (Pet. App. 16a). We fail to see how that test significantly differs from the *Kotteakos* standard,[8] or

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[8] *Kotteakos* stated the following standard for determining whether a trial error was harmless (328 U.S. at 764-765; footnote & citation omitted):

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. * * * But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather,

how it "is far more detrimental to [petitioner]" (Pet. 20). Indeed, if there is an inconsistency, it could be argued that *Kotteakos* suggests a more lenient harmless error standard insofar as it permits a conviction to stand unless "one is left in grave doubt" about whether the error had "substantial influence." 328 U.S. at 765.

Whatever theoretical differences there may be in the verbalization of the standard, the misconduct in this case would have constituted harmless error under even the most stringent standard. As the court of appeals pointed out (Pet. App. 11a), the prosecutor's improper reference to the Nevada case did not imply any impropriety on petitioner's part. Further diminishing any remote possibility that the misconduct could have materially influenced the verdict, the district judge gave the jurors remedial instructions, cautioning them that the Nevada case was irrelevant and that they should disregard everything that had been said about that case (*id.* at 10a; Tr. 2425-2427). See *United States* v. *Hammond*, 642 F.2d 248, 249-250 (8th Cir. 1981); *United States* v. *Berry*, 627 F.2d 193, 198 (9th Cir. 1980), cert. denied, 449 U.S. 1113 (1981).[9]

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even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

[9] Because, as we have argued above, there is no material difference between the *Kotteakos* standard and the test employed by the court below, petitioner is wrong in suggesting (Pet. 20-21) that there is any genuine conflict between the decision below and cases which have expressly followed *Kotteakos*. In any event, this case would be an inappropriate vehicle for resolving any possible conflict, because, as we have suggested, the result would be proper even under a more stringent standard than the one applied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

VINCENT L. GAMBALE
Attorney

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Petitioner's Reply Brief

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PETITIONER'S REPLY MEMORANDUM

GEORGE KAUFMANN
(Counsel of Record)
WOODY N. PETERSON
MARK A. PACKMAN
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for Petitioner

Of Counsel:

JOHN E. MILONAS
459 Fulton Street
San Francisco, CA 94102

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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PETITIONER'S REPLY MEMORANDUM

ARGUMENT

Because the government does not deny that both questions presented by the Petition are of sufficient importance to warrant review, and does not address, let alone controvert, the Petition's analysis of this Court's precedents, this reply can be short. We shall discuss the two questions presented *seriatim*.[1]

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[1] "Pet." will refer to the Petition for Certiorari; "Br. Opp." will refer to the Brief for the United States in Opposition.

We note that the Brief Amici Curiae of five international unions was filed more than two weeks before the Brief in Opposition, so that the government had every opportunity to take issue with that Brief's assessment of the impact of the decision below on labor organizations.

1. The government's Statement (Br. Opp. 1-3) merely sets forth that portion of the evidence which supports its theory at trial that the challenged expenditures were not for a union purpose. That evidence was sufficient to allow the jury to convict the petitioner, if it discredited his contrary explanations of those expenditures. But that is not the issue here. Rather, the first question presented arises because the trial court failed to properly instruct the jury as to the law (despite its prior assurances, Pet. 5); the jury was thereby enabled to convict the defendant even if it believed that he spent the money for the union purposes as to which he testified.[2] Specifically, the jury may have convicted the petitioner if it determined that the union bylaws did not authorize the expenditures, or could not under § 501(c) lawfully do so. Under the principles discussed in point I of the Petition, the applicability, meaning and legality of the bylaws, on which the defense concededly depended (Pet. 3a-4a), were questions of law, as to which the court had the duty, especially on the defendant's request, to instruct the jury.

With respect to this issue the government asserts only that such instructions were unnecessary. But the fact that the union bylaws "were read and explained to the jury during the testimony of three defense witnesses, including petitioner" (Br. Opp. 4), only put his defense before the jury; it did not guide the jury's deliberations. And the fact that these bylaws "were reviewed in detail by defense counsel during opening and closing remarks to the jury" (*id.*) is, of course, no substitute for instructions by the court. Under Justice Brandeis' opinion in

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[2] In light of the general verdict, reversal is, of course compelled if the conviction could have been due to erroneous instructions. See, *e.g.*, *Sandstrom v. Montana*, 442 U.S. 510, 526; *Yates v. United States*, 354 U.S. 298, 311-312; *Brotherhood of Carpenters v. United States*, 330 U.S. 395, 408-409. Here, moreover, there is objective evidence that at least some of the jurors believed Tham, because the jury would not otherwise have inquired as to Brundage's testimony (Pet. 6-7).

Great Northern (Pet. 13) the court was required either to construe the bylaws, or to inform the jury as to how to construe them in light of the testimony.

The court's failure to instruct the jury as to the *legality* of the bylaws is shown to be fundamental error by the government's own argument. It correctly observes that the court instructed the jury that § 501(c) is the ultimate authority governing the legality of the union expenses regardless of what the bylaws provided (Br. Opp. 7). Precisely for that reason it was essential that the court instruct the jury concerning the scope of § 501(c), lest the jury decide erroneously that expenditures which were for a purpose authorized by the bylaws, were nevertheless forbidden. See particularly Pet. 14, 16-19.

2. The government "fail[s] to see how [the "more probable than not"] test significantly differs from the *Kotteakos* standard, or how it 'is far more detrimental to petitioner]' " (Br. Opp. 10-11, quoting Pet. 20, footnote omitted). There are none so blind as those who will not see. The "verbalization of the standard" (Br. Opp. 11) in *Kotteakos* (*i.e.*, its expression in words by this Court), its reaffirmation in *Agurs*,[3] and Chief Justice Traynor's analysis in his treatise, all quoted at Pet. 20-21, make it entirely clear that the test adopted below is significantly more lenient to the government than that permitted by this Court's construction of the "harmless error" statute, 28 U.S.C. § 2111. In even sharper conflict with the decision below are those appellate decisions (ignored by the government) which go beyond *Kotteakos* with respect to prosecutorial misconduct (see Pet. 22). Nor are these differences merely "theoretical" (Br. Opp. 11), since as Justice Frankfurter wrote in an analogous context, "a standard leaving an unavoidable margin for individual judgment does not leave the judicial judgment at large even though the phrasing of

[3] *United States v. Agurs*, 427 U.S. 97, 112.

the standard does not wholly fence it in." (*Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 489). The explication and elaboration of such legal standards is, of course, a question of law, and it is one which should be reviewed by this Court, given the conflict of decisions and the undisputed prevalence of the problem (Pet. 22-24).

The government would leave this conflict unresolved and allow the judgment to stand although the court below erroneously failed to adhere to this Court's precedents. For it contends that the prosecutor's misconduct here "would have constituted harmless error under even the most stringent standard." (Br. Opp. 11). But this Court cannot, in passing on a petition for certiorari, conduct the examination of the record that would be necessary to satisfy itself that this claim is justified.[4] Putting the matter concretely, and in terms of *Kotteakos*, rather than "the most stringent standard" (*id.*), this Court cannot be "sure that the [prosecutor's references to the petitioner's doing favors for the Nevada judge] did not influence the jury, or had but slight effect." *United States v. Agurs*, 427 U.S. 97, 112, quoting *Kotteakos*, 328 U.S. at 764.[5] Moreover, under the rule which we

[4] It is significant in this connection that the court below did not find, and the government does not even contend, that the evidence of petitioner's guilt is so strong that prejudice was improbable. Contrast, *e.g.*, *United States v. Modica*, 663 F.2d 1173, 1182 (C.A. 2), petition for certiorari pending, No. 81-1630. And while the trial court's attempt to cure the misconduct is undoubtedly a relevant consideration (Br. Opp. 11), reversals despite such instructions are common, as illustrated by three cases cited in the Petition: *United States v. Norton*, 639 F.2d 427, 429, n.2 (C.A. 8); *United States v. Millen*, 594 F.2d 1085, 1088 (C.A. 6); *United States v. Rodriguez*, 627 F.2d 110, 112 (C.A. 7).

[5] Indeed, we believe that the court of appeals should have found prejudice even under its erroneous "more probable than not" test. Jurors would be particularly sensitive to an accusation that the defendant had previously escaped conviction by improperly influencing the tribunal; not only would they think that he was a bad man,

believe is correct (Pet. 24-25), the government should not even be heard to argue that these four references (Br. Opp. 9, n. 7) "did not imply any impropriety on petitioner's part" (*id.* 11), since the prosecutor was obviously attempting to influence the jury against the petitioner, rather than the absent judge.

CONCLUSION

For the reasons stated in petition for a writ of certiorari and herein, the petition should be granted.

Respectfully submitted,

GEORGE KAUFMANN
(Counsel of Record)
WOODY N. PETERSON
MARK A. PACKMAN
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for Petitioner

Of Counsel:

JOHN E. MILONAS
459 Fulton Street
San Francisco, CA 94102

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but they would consciously or unconsciously strain to prevent him from "getting away" again. We did not seek certiorari on this additional point only because of the necessary limitations on this Court's certiorari jurisdiction. Compare *Universal Camera Corp., supra* with *Labor Board v. Pittsburgh S. S. Co.*, 340 U.S. 498, 502-503.

Amicus Brief

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BRIEF AMICI CURIAE FOR THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC., LABORERS INTERNATIONAL UNION, ETC., AFL-CIO, UNITED BROTHERHOOD OF CARPENTERS, ETC., AFL-CIO, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

DAVID PREVIANT
Counsel of Record
ROBERT M. BAPTISTE
25 Louisiana Avenue, N.W.
Washington, D.C. 20001
Area Code 202, 624-6940
Counsel for the International Brotherhood of Teamsters, Etc.

ROBERT J. CONNERTON
1899 L Street, N.W.
Washington, D.C. 20036
Counsel for Laborers' International Union of North America, AFL-CIO

WILLIAM A. MCGOWAN
101 Constitution Avenue, N.W.
Washington, D.C. 20001
Counsel for United Brotherhood of Carpenters and Joiners of America, AFL-CIO

NORMAN LEONARD
1182 Market Street
San Francisco, Calif. 94112
Counsel for International Longshoremen's and Warehousemen's Union

LESTER ASHER
228 North LaSalle Street
Chicago, Illinois 60601
Counsel for Service Employees International Union, AFL-CIO

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

When a defendant charged with embezzling union funds in violation of 29 U.S.C. § 501(c) produces evidence that he expended those funds pursuant to union bylaws, is he entitled, upon request, to have the Court instruct the jury concerning the meaning, applicability and legality of those bylaws?

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The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (I.B.T.), Laborers' International Union of North America, Service Employees International Union, United Brotherhood of Carpenters and Joiners of America, International Longshoremen's and Warehousemen's Union (hereinafter "International Unions") file this brief *amici curiae* in support of the Petition For a Writ Of Certiorari. The Petitioner and Respondent have consented to the filing of this brief.

INTEREST OF THE INTERNATIONAL UNIONS AND ISSUE TO BE COVERED IN THEIR BRIEF AMICI CURIAE

The International Unions have collectively been representing working men and women in the United States and Canada for almost 100 years. Their organic structure is set forth in their Constitutions. They are comprised of affiliated local labor unions which represent their members in the day-to-day relationship with their employers, including the negotiation of collective bargaining agreements and handling disputes which arise in the work place. Their members pay monthly dues, the formula for which is set forth in the various Constitutions, and as permitted by applicable law. Out of the total monthly dues paid to the Local Unions, certain amounts, usually computed on a per capita basis, are paid to the International Unions and other affiliated bodies, all of which also furnish essential services and the benefits of organization to the local union membership. The balance of the funds becomes the property of the local union and its members (local union treasury) and is held for the benefit of the membership. The local union treasury or property is not subject to division and distribution among the members.

It is the alleged improper diversion from the treasury of a local union affiliated with the I.B.T. which gave rise to this case. Petitioner has asserted that each such expenditure was made in the good faith belief that it was made for the benefit of the union, was reasonable in amount, and that he was authorized to make each expenditure by the local union bylaws.

As representative of a large and important segment of organized labor, the International Unions have an interest in judicial decisions as they affect the relationships of union bylaws to the fiduciary obligations of

union officers, and as they may impinge upon the principle of self-government of labor unions. The decisions below unreasonably diminish the stability of well-established and constantly used procedures within labor organizations by subjecting union officers and employees to potential criminal liability for spending money in the course of their employment in accordance with union bylaws. By refusing to allow the jury to hear relevant testimony, and by refusing to give proper instructions to the jury, the lower court decisions, if allowed to stand, will dilute an important legal protection which Congress intended union officers to have. The decisions below also denigrate the importance of union bylaws and their scheme in union self-government.

The issue to which this brief *amici* is addressed may be restated as follows: when workers, with the assistance of counsel, draft and adopt bylaws to govern the conduct of their affairs and the manner in which their funds may be expended, and the officers elected by such workers rely on such bylaws to make certain expenditures, is not the applicability, meaning and legality of the bylaws so crucially relevant to the issue of whether there has been a violation of Section 501(c) so as to require specific instruction to the trial jury concerning such matters? It is respectfully submitted for the reasons stated below that the question is of such great significance in the application of laws regulating labor unions that the petition for certiorari should be granted.[1]

STATEMENT OF THE CASE

Petitioner Tham, for over thirty years, has been the principal officer of Local 856, an affiliate of the I.B.T. He was convicted of embezzling $2,005.04 from such

[1] In the interest of brevity we do not repeat Petitioners exposition of the law relating to the significance of adequate court instruction to the requirement of due process. We adopt Petitioner's argument *in toto*.

Local Union over the course of four years. The linchpin of his defense was that he expended the funds in the good-faith belief that such expenditures were authorized by the union bylaws and were for the union's benefit. The centrality of the bylaws to this case was recognized not only by the defense, but also by the prosecution, which put into evidence three volumes of the I.B.T. Constitution and Local Union's Bylaws.

The principal witness against Tham was Aladena Frattiano, an admitted underworld assassin turned government informer. About $1,336.00 of union funds were spent to defray Frattiano's hotel accommodations and meals over a period of four years during the course of the latter's efforts to secure eye and dental care plans for union members. Frattiano also so testified (R.T. 807.) Petitioner believed the expenditures were justified because they were beneficial to the membership and authorized by the union bylaws.

Albert Brundage, a distinguished labor attorney and a draftsman of the bylaws, testified generally that the purpose of the bylaws was to permit expenditures which affected the welfare of the union "either directly or indirectly." He also testified that he told Petitioner that the bylaws were designed to permit the secretary-treasurer to make such spending determinations without concurrence of the executive board or membership.

The defense also sought to elicit Brundage's testimony regarding which specific provisions of the bylaws, out of the three volumes then in evidence, were applicable to the case, and, as draftsman, to explain their legal background. The trial court sustained the prosecution's objection to this testimony, ruling that the meaning and applicability of the bylaws was a question of law to be covered in the court's instructions to the jury, and could

not be properly brought out through Brundage. (R.T. 2563)

At the close of the trial, however, the Court refused to instruct the jury on any part of the bylaws. Although the documents were admittedly lengthy and complex (R.T. 2876) the trial court offered the jury no guidance as to which bylaws out of the three volumes of evidence might apply to Petitioner's defense. The Court stated only that the jury might consider "the applicable provisions of the International Constitution and Bylaws," but provided no assistance as to which provisions were, or might be, in fact or in law, "applicable."

Nor was the jury given guidance on the legality of the bylaws to balance against the persistent efforts of the prosecution to suggest their illegality. The jury was not even told what a reasonable construction of the bylaws might be so that it could evaluate Petitioner's "good faith" defense. Instead, the Court told the jury only that no matter how broadly written, the bylaws could not justify spending money for "any old thing." (R.T. 3150-52, 3224)

That the jurors needed guidance on these issues could not be clearer. They specifically requested that Brundage's testimony on the bylaws be re-read to them. The trial judge, however, discouraged pursuit of the request and disparaged the testimony by telling the jury that it was not to consider such testimony to the extent it may be in conflict with the judge's instructions. Yet the Court had refused specific instructions in the area covered by Brundage's testimony. The jury apparently took the Court's comments as an expression of the little worth of Brundage's testimony, and withdrew its request. And it is indisputable that the jurors were required to deliberate in a vacuum, and decided the fate of Petitioner without any comprehension of the specific underpinning

for the Petitioner's main contention that the bylaws authorized the expenditures.

The Court of Appeals for the Ninth Circuit affirmed the trial court's refusal to instruct on the bylaws.

SUMMARY OF ARGUMENT

By affirming the trial court's refusal to instruct the jury on the meaning, legality and applicability of the union bylaws, the decision below creates an impossible dilemma for all union officials everywhere. On the one hand, Section 501 affirmatively requires union officers, when they expend union funds, to do so only in accordance with union's bylaws. If they do not, they risk internal union charges as well as criminal and civil liability. On the other hand, if the union official does spend money pursuant to the bylaws, the conviction below, and the opinion which sustains it, would put the fate of the officer in the hands of a jury which would deliberate in ignorance of the meaning, applicability and legality of the cornerstone of the officer's authority to act, the union bylaws. Equally as important, the Union has no guidance for self-government.

This perverse result is directly contrary to the plain meaning of the statute and the intent of Congress.

The petition for writ of certiorari should be granted to consider this important question.

ARGUMENT

The Petition For Certiorari Should Be Granted Because Affirmance Of The Trial Court's Refusal To Instruct The Jury On The Meaning, Applicability And Legality Of The Union Bylaws Jeopardizes All Union Officials Who Spend Funds Relying On Such Bylaws, And Interferes With The Efficient Operations Of Unions

The specific legislation adopted by Congress in 1959 (29 U.S.C. § 401 *et seq.*) establishes the statutory basis for asserting a "fiduciary" obligation upon all officers and other representatives of labor organizations to expend union funds in accordance with their Constitution and Bylaws.

Section 501 of the Labor-Management Reporting and Disclosure Act of 1959, Pub.L. 86-257, Sept. 14, 1959, 73 Stat. 519, 535 (hereinafter "LMRDA") provides as follows:

> § 501. Fiduciary responsibility of officers of labor organizations
>
> (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory

> provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.
>
> * * * *
>
> (c) An person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

It is clear from the statute that Congress intended the widest possible preservation of established procedures and practices "without departing needlessly from the longstanding Congressional policy against unnecessary governmental interference with internal union affairs." [2]

Such Congressional intent is clear from the entire statutory scheme of the LMRDA, which repeatedly and emphatically establishes the union bylaws as the foundation of union self-government and the guidepost for union officials' conduct.[3]

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[2] *Hodgson* v. *Steelworkers*, 403 U.S. 333, 338 (1971); *Wirtz* v. *Bottle Blowers Assn*, 389 U.S. 463, 470-471 (1968).

[3] Every labor organization is required to have a constitution and bylaws. 29 U.S.C. § 431(a). It is also required to report, among other things, the procedures followed for disbursement of its funds. 29 U.S.C. § 431(a)(5)(D). See also in addition to § 501(a) the following sections of LMRDA: 411(a)(1); 411(a)(2); 411(a)(3); 411(a)(3)(B)(iii); 411(a)(4); 413; 462; 463(a)(2); 464(c); 481(f); 481(h); and 483. Even where the Secretary of Labor conducts a rerun election after a violation of Title IV has been found, § 482(c) directs him to do so, "so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization."

It would be an anomalous construction of this statute, and therefore a highly suspect one, if a union official could be prosecuted for his conduct as an official without reference to the bylaws which create the standard for such conduct and which Congress firmly established at the center of the union-member-officer relationship. These bylaws, adopted by, and, representing the will of, the membership, are literally the "Bible" by which the officers and agents must conduct their union business (R.T. 1878-1879). The officers and agents can feel secure in the conduct of their business only so long as they act pursuant to authority granted them by the bylaws and only so long as the expenditures of the fund is, in their judgment, for a legitimate union purpose. And union members are secure in their self-government when this happens.

That Congress intended union bylaws to be the central focus to any prosecution under § 501(c) is clear from the plain language of the statute, requiring, as it does, that officers of a union "hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance *with its constitution and bylaws* and any resolutions of the governing bodies adopted thereunder." 29 U.S.C. § 501(a) (emphasis added). To construe § 501(c) as supporting a prosecution for embezzlement in this case in view of § 501(a) directing union funds to be spent in accordance with the Constitution and bylaws would fly in the face of the Congressional intent expressed in § 501(a). Compliance with the statutory fiduciary standards cannot be "embezzlement" under § 501(c).

If there were any ambiguity as to the purpose of the statute, the legislative history removes all doubt about the critical importance of the bylaws to an officer's defense against a § 501(c) prosecution. Discussing the Section of H.R. 8432 which later became 29 U.S.C. § 501,

Representative O'Hara delineated precisely the impossible dilemma, alluded to earlier in this brief, confronting a union official when deprived of the defense of spending authorization under the union bylaws:

> "If it is made in accordance with, and for a purpose permitted by, the constitution, bylaws or regularly adopted resolutions of the union's constitutional governing bodies, *the officers or employee will not be required at his peril to determine whether or not the constitution, bylaws or resolution goes beyond the legitimate purposes and objectives of the organization. To do this would place them in an impossible position.* . . . If an officer or employee of a labor organization failed to invest or expend the union's funds in accordance with the wishes of the membership, he would be guilty of a breach of his duties to the organization, and if he did act in accordance with their wishes, he might at some later time be told by a court of law that he breached the trust placed in him by doing so." 105 Cong. Rec. 15690 (1959) (emphasis added).

Senator John F. Kennedy likewise pointed to the union bylaws as the standard by which the officer's obligation must be measured:

> "The bill does not limit in any way the purposes for which the funds of a labor organization may be expended or the investments which can be made. Such decisions should be made by the members in accordance with the constitution and bylaws of their union. *Union officers will not be guilty of breach of trust under this section when their expenditures are within the authority conferred upon them either by the constitution and bylaws,* or by a resolution of the executive board, convention or other appropriate governing body including a general meeting of the members —not in conflict with the constitution and bylaws. This is also made clear by the fact that section tion 501(a) requires that the special problems and functions of a labor organization be taken into con-

> sideration in determining whether union officers and other representatives are acting responsibly in connection with their statutory duties." 105 Cong. Rec. 17900 (1959) (emphasis added).

The proponents of the LMRDA in Congress thus intended that the bylaws should define the scope of the officer responsibility, and that actions consistent with such bylaws would not give rise to criminal liability.[4]

Relying on this legislative history, judicial constructions of § 501 also recognizes that the bylaws create the standard for the expenditure of union funds by a union officer. In *Gabauer* v. *Woodcock*, 594 F.2d 662, 670 (8th Cir. 1979), the Court pointed out "[T]he union membership chose not to specifically restrict the discretion of union officers. Given the broad authorizations endorsed by the union membership and the absence of specific restrictions, this Court has neither the power nor standards by which to review expenditures challenged by a minority of the union merely because of their politically controversial character." *Gabauer* cited with approval *McNamara* v. *Johnston*, 522 F.2d 1157, 1163 (7th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976), and a host of other decisions, law review articles and several pages of legislative debates.

One of the highly regarded consultants cited in *Gabauer* (594 F.2d at 670) is Archibald Cox, consultant to the Committee in drafting the Act, who confirmed that the bylaws are the measure of the officer's duty concerning union expenditures:

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[4] The exception, of course, was that general exculpatory provisions would not absolve union officers of liability. 29 U.S.C. § 501(a). This very exception to the defense provided by the bylaws underscores the importance of instructions on the legality of the bylaws, particularly where, as here, the prosecutor intimates the bylaws are invalid without demonstrating that they fall within the exception for general exculpatory claims. The jury was thus left to speculate whether, as a matter of law, petitioner's defense of reliance on the bylaws had any valid basis.

> "Section 501 imposes no restrictions upon the purposes for which a labor organization may expend its funds. The propriety of union activities other than collective bargaining, such as charitable contributions and support for political candidates, may be fairly debatable but this is a separate issue of too great importance for the courts to resolve by interpreting a provision which deals directly with only the duties of union agents to the organization and its members. Read in their context the words are plain; it is made the duty of the union officers and agents "to manage, invest, and expend . . . [the union's money and property] in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder. *An agent who follows the instructions of his principal is not guilty of a breach of fiduciary duties. Section 501 emphasizes the importance of giving careful attention to the constitutional provisions and resolutions of governing bodies but where the union grants the necessary authority, no statutory restriction is imposed.* If there were ambiguity it would be dispelled by the statement of five members of the House Labor Committee in reporting the committee bill, for they were the five who sponsored the bill and they included Congressman O'Hara, who proposed section 501 in the Labor Committee. Senator Kennedy gave a similar explanation in presenting the Conference Report." Cox, *Internal Affairs of Labor Unions Under The Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 829 (1960) (emphasis added). See also, Smith, *The Labor Management Reporting And Disclosure Act of 1959*, 46 Va. L. Rev. 195, 228 (1960).

Indeed, it is difficult to see what better standard other than the bylaws could adequately and clearly define the scope of a union officer's authority to disburse union funds.

While the District Court did not so construe § 501(c) it did recognize the relevancy of the bylaws to the issue of intent, and so instructed the jury. But by failing either to pass on the meaning, applicability or legality of

the bylaws as a matter of law, or by failing to give instructions by which the jury could do so, it created a severe hazard for local unions and their officials.

It is pertinent to recall that this Court, albeit in a civil rather than criminal context, has interpreted the Labor-Management Reporting and Disclosure Act in the light of the Court's conclusion that the Congress intended a minimal intrusion by the courts into the internal affairs of labor organizations. *International Brotherhood of Boilermakers* v. *Hardeman*, 401 U.S. 233, 242-46 (1971); *Hodgson* v. *Local 6799, United Steelworkers, supra*, 403 U.S. at 338-39; *Wirtz* v. *Local 153, Glass Bottle Blowers, supra*, 389 U.S. at 470-71.

By a parity of reasoning a similar judicial restraint and deference to the principle of union self-government in criminal cases such as this requires that the trial court instruct a jury specifically and completely on internal rules of the labor organization relating to the expenditure of union funds, rather than treating such internal regulations as cavalierly as did the trial court here.

It is in light of these readings of the statute and the Congressional intent to preserve union self-government that we now return to the crucial issue in this case. The issue involves more than whether union officers must guess at the scope of their authority to expend union funds with their liberty at stake on the outcome. So long as the decision below is permitted to stand unions cannot conduct their affairs by the delegation of defined authority to the officers they elect to manage their organization. The principle of union self-government will be irreparably impaired.

To preserve that principle the governing laws of the union must be explained to the jury considering the question of whether there was unauthorized, unlawful expenditure of union funds amounting to an embezzlement.

Unions bylaws and the government of union affairs, sometimes called the "Dismal Swamp," [5] are not easily understood, nor is their import readily arrived at. For these reasons, courts have always accepted their reasonable interpretation of their own bylaws. *English* v. *Cunningham*, 282 F.2d 848, 850 (D.C. Cir. 1960); *Vestal* v. *Hoffa*, 451 F.2d 706, 709 (6th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972); *Local Union No. 657, Etc.* v. *Sidell*, 552 F.2d 1250, 1256-57 (7th Cir.), *cert. denied*, 434 U.S. 862 (1977); *Stelling* v. *IBEW*, 587 F.2d 1379, 1388 (9th Cir. 1978), *cert. denied*, 442 U.S. 944 (1979); *Drywall Tapers & Pointers* v. *Operative Plasterers*, 601 F.2d 675, 679 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980). *Gabauer* v. *Woodcock*, *supra*, 594 F.2d at 670; Plumbers, *Local 434* v. *Plumbers*, 109 L.R.R.M. 2506 (3d Cir. 1982). A jury of laymen should not be permitted to wander at large through a maze of three volumes of constitutions and bylaws without a guide. They are not familiar with the special characteristics of labor union government referred to by the Congress when it specifically provided that the duty imposed on union officers must take "into account the special problems and functions of a labor organization . . . ." 29 U.S.C. § 501(a).

The jury in this case was obviously uninformed but conscientious and interested in this precise subject. It returned to the court room and asked questions of the Court directed specifically to the meaning of the constitution and bylaws of the organization. The trial court erred in the manner it handled those questions. It erred in its original instruction, and it completely ignored the opportunity to correct the instruction when the jury returned for additional information.

Given the importance of the bylaws to a union officer's defense in a prosecution under § 501(c), the trial court was under a duty to instruct the jury as to the legal effect of the bylaws. In failing to do so, the Court com-

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[5] The classic discussion of the problem is Chafee, *The Internal Affairs Of Associations Not For Profit*, 43 Harv. L. R. 993, 1024 (1930).

mitted clear error. Petitioner was entitled to be tried by a jury informed as to the meaning, applicability and legality of the bylaws adopted by the members of a labor union to govern their affairs. Instead, a jury of lay persons, presumably with no special expertise in the construction of internal union rules, was left to sift through three volumes of union bylaws and constitutional provisions, and to decide, without any criteria whatsoever, which ones were legal, whether they applied to the case, and what they meant. The sole guidance the trial court gave the jury was the observation that bylaws cannot authorize expenditures for "any old thing."

We submit that to try a person under such instructions, or lack of them, is tantamount to a trial without instructions as to the legal elements of the crime, and clearly offends due process of law. *Bollenbach* v. *U.S.*, 326 U.S. 607, 611-13 (1946).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

DAVID PREVIANT
Counsel of Record
ROBERT M. BAPTISTE
25 Louisiana Avenue, N.W.
Washington, D.C. 20001
Area Code 202, 624-6940
Counsel for the International Brotherhood of Teamsters, Etc.

ROBERT J. CONNERTON
1899 L Street, N.W.
Washington, D.C. 20036
Counsel for Laborers' International Union of North America, AFL-CIO

WILLIAM A. MCGOWAN
101 Constitution Avenue, N.W.
Washington, D.C. 20001
Counsel for United Brotherhood of Carpenters and Joiners of America, AFL-CIO

NORMAN LEONARD
1182 Market Street
San Francisco, Calif. 94112
Counsel for International Longshoremen's and Warehousemen's Union

LESTER ASHER
228 North LaSalle Street
Chicago, Illinois 60601
Counsel for Service Employees International Union, AFL-CIO